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No. 15271

In the

United States Court of Appeals

For the Ninth Circuit

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OREGON PLYWOOD SALES CORPORATION,
Appellant,

v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC PLYWOOD, INC., *Appellees.*

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon

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HONORABLE GUS J. SOLOMON, Judge

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
HERBERT H. ANDERSON
CHARLES H. CLARKE
Eighth Floor, Pacific Bldg., Portland 4, Oregon
Attorneys for Appellant Oregon Plywood Sales Corporation.

KING, MILLER, ANDERSON, NASH & YERKE
FREDERIC A. YERKE, JR.
MARK C. McCLANAHAN
926 American Bank Bldg., Portland 5, Oregon
GEORGE A. LUOMA
United States National Bank Bldg., Roseburg, Oregon
Attorneys for Appellees.

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JURISDICTION

This action was commenced in the United States District Court for the District of Oregon by appellant Oregon Plywood Sales Corporation, a New York Corporation, against appellee Sutherlin Plywood Corporation, an Oregon corporation, and appellee Nordic Plywood, Inc., an Oregon corporation. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00. (Tr. 4, 25).

Appellant has appealed from the final judgment and decree of said court (Tr. 67-68).

The District Court acquired jurisdiction under 62 Stat. 930, USC 1332. This court acquired jurisdiction under 62 Stat. 929, 28 USC 1291.

STATEMENT OF THE CASE

For convenience appellee Sutherlin Plywood Corporation will be referred to as Sutherlin and appellee Nordic Plywood Inc. will be referred to as Nordic.

Sutherlin was incorporated in November, 1951, for the purpose of operating a "plywood lay-up mill," i.e. a mill which purchases green veneer and processes it into plywood by drying, gluing, sanding, etc. (Tr. 25).

By November 1953 Sutherlin's mill was completed and it was ready to operate. But Sutherlin needed working capital to buy veneer and to meet payrolls (Tr. 116, 72).

Appellant agreed to arrange a loan to Sutherlin of $80,000.00 for working capital, to advance the cost of purchases of veneer for Sutherlin, to use its best efforts to maintain with Sutherlin a 30 day order file for its product and to advance 80% of the mill value of the products upon receipt of invoices, that is, to provide accounts receivable financing. In return Sutherlin

agreed to give appellant the right to purchase 80% of its output (Ex. 1, 2).

Paragraph one of the contract (Ex. 1) grants to appellant "the right to purchase up to 80% of the output" of Sutherlin. In that paragraph Sutherlin also "agrees to accept up to 80% and ship appellant's orders as specified and within a reasonable time."

Sutherlin expressly agreed that "this sales contract shall be in full force and effect from the beginning of production * * * and continue for at least 50 months." (Ex. 1).

We contend that the above provisions of the contract together with the contract as a whole and the burdens assumed by appellant indicate that continuous operation by Sutherlin for the term of the contract was intended and expressly promised.

Disregarding the express provisions of the contract and its clear intent, Sutherlin ceased operation April 21, 1954. On September 7, 1954, Sutherlin disabled itself from continuing its business and from carrying out the terms of the contract by selling its mill to Nordic. Since that date Nordic has continuously operated the mill. (Finding XXVIII, Tr. 61).

Sutherlin contends that financial difficulties excused it from performing its contractual obligations. The court

agreed that financial difficulties were an excuse for performance of contractual duties. At p. 254 of the transcript the following appears:

> "Mr. Anderson: Is your Honor holding that financial difficulties are an excuse for performance?
>
> The Court: Yes, I am holding precisely that."

But Sutherlin did not have any serious financial difficulties. Its liabilities were $213,270.10 (Ex. 5, 131). Nordic successfully operated the mill commencing in September, 1954 with liabilities of $679,319.19! (Ex. 6, 133). Nordic did not have the financial advantages which Sutherlin had, such as financing of its veneer purchases (the major part of the expense) and accounts receivable financing by appellant, both without charge to Sutherlin.

Appellant did these things for Sutherlin:

1. Loaned Sutherlin $80,000.00 (Tr. 125).

2. Purchased veneer for Sutherlin at a cost of $214,-346.87 (Ex. 24, Finding XXIX).

3. Supplied Sutherlin with orders for its production (Tr. 85).

4. Advanced 80% of the mill value of Sutherlin's production upon the receipt of invoices (Tr. 85, 119).

In return Sutherlin was obligated to grant appellant the right to purchase 80% of its output and to accept and ship appellant's orders for the term of the contract.

The written agreements are contained in two documents. Exhibit 1 is the sales contract whereby Sutherlin agreed to grant appellant the right to purchase up to 80% of its output, to accept and ship appellant's orders and to continue the contract in full force and effect for at least 50 months. Appellant agreed in that document to use its best efforts to maintain with Sutherlin a 30 day order file and to finance its accounts receivable.

Exhibit 2 was executed by appellant's parent corporation, Oregon Plywood Corporation, which agreed to loan Sutherlin $80,000.00 and to buy the veneer required for Sutherlin's operation.

Sutherlin commenced production in January 1954 (Tr. 54). Although appellant continued to furnish orders to Sutherlin, continued to purchase veneer for Sutherlin and continued to advance 80% of the mill value of Sutherlin's product, Sutherlin disregarded its contract, ceased production on April 21, 1954, and sold its mill to Nordic on September 7, 1954.

Nordic was aware of Sutherlin's contract with appellant before the sale (Tr. 27). Nordic knew that the sale of the mill would disable Sutherlin from perform-

ance of its contract with appellant (Finding XXV, Tr. 60, 133, 135) and Nordic did not intend to furnish the product of the mill to appellant (Tr. 28). By cosummating the purchase of the Sutherlin mill in September, 1954, Nordic thereby interfered with appellant's contract rights and is responsible for damage resulting to appellant.

Sutherlin's breach of the sales contract resulted in damages to appellant of $72,000.00 up to the date of the trial on March 27, 1956. Nordic's interference with appellant's contract rights prevented performance of said contract and caused the same damages. Sutherlin's failure to continue in operation damaged appellant in an additional amount of $20,000.00 which occurred prior to the time it was disabled from further performance by the sale.

Appellant brought this action to recover from Sutherlin for breach of contract and to recover from Nordic in tort for interfering with its contractual rights and to enjoin Nordic from further destruction of appellant's contract rights. The trial court held that Sutherlin was excused from performance of its contract because it had financial difficulties and that Nordic had not interfered with appellant's contract rights. It entered judgment accordingly. From that judgment appellant has appealed to this court.

Appellant recovered judgment against Sutherlin in the amount of $3,924.78 on various open account items and no appeal has been taken from that portion of the judgment by any party.

QUESTIONS PRESENTED

1. Did Sutherlin breach its contract by discontinuing operation in April, 1954, and by selling its mill to Nordic in September, 1954, thereby disabling itself from performance of its contract with appellant?

2. Did Nordic interfere with appellant's contract rights by purchasing Sutherlin's mill with the knowledge that Sutherlin would thereby be disabled from performing its contract with appellant?

3. For what amounts are Sutherlin and Nordic liable to appellant?

4. Should further destruction of appellant's contract rights be prevented by enjoining Nordic from selling the product of the Sutherlin mill unless appellant's right to purchase 80% of the product is honored?

SPECIFICATION OF ERRORS

I

The trial court erred in entering Finding VIII (Tr. 53) that:

1. Appellant "knew that the condition of the market was not favorable to the prospects of successful operation of a newly organized plywood company organized as was defendant Sutherlin Plywood Corporation." There is no evidence of such knowledge and the only reasonable inference to be drawn from the fact that appellant agreed to loan $80,000.00 to Sutherlin, agreed to finance Sutherlin's veneer purchases without charge in an expected amount of $75,000.00 per month and agreed to advance 80% of the mill value of Sutherlin's product on receipt of invoices is that appellant believed prospects were favorable for Sutherlin's successful operation.

2. Appellant knew Sutherlin "was weak financially and was in dire need of working capital" when the contract (Ex. 1) was executed on December 17, 1953. This finding is not material and it is contrary to the evidence. The evidence is that on December 31, 1953, Sutherlin had a net worth of $482,820.65, long term debt of only $28,253.95 on purchase contracts and $39,000.00 on its mortgage to appellant as shown on its balance sheet (Ex. 5). Even by including one year's payments on its long term debt in its current liabilities it had sufficient current assets to meet them. Its current assets were $95,269.48 and its current liabilities (including installments due for one year) were only $95,870.38. This statement does not include another $30,000.00 which

appellant had agreed to loan. Admittedly, Sutherlin needed working capital before it met appellant, but appellant's agreement to loan $80,000.00 supplied the working capital.

3. Appellant "knew of and appreciated the risks that Sutherlin might not be able to operate profitably and might be compelled to shut down" and knew that Sutherlin "might not be able to keep the mill in operating condition." There is no evidence that Sutherlin was compelled to shut down or that it was unable to keep the mill in operating condition. The evidence is to the contrary. But in any event there is no evidence that appellant knew of or considered those matters.

II

The court erred in entering Finding XIII (Tr. 56) that Sutherlin at the time it ceased operations and since "has been unable to pay its obligations as they matured." This finding is not supported by the evidence. It is not within the issues in this case in any event. It does not indicate that Sutherlin was unable to operate in the unprecedented seller's market which existed from the summer of 1954 to the time of trial.

III

The court erred in entering Finding XIV (Tr. 56) to the effect that when Sutherlin ceased operating its work-

ing capital was completely depleted and it was unable to pay certain expenses. This finding is unsupported by the evidence. It is not within the issues. Financial difficulty is not an excuse for performance. Sutherlin's financial difficulty did not, in fact, prevent performance. Nordic's successful operation of the same mill with even less capital proves that Sutherlin would have been able to continue in operation if it had tried.

IV

The court erred in entering Finding XV to the effect that "Sutherlin diligently and persistently sought additional financing." There is no evidence to support this finding. The evidence is only that there was an attempt to borrow money from the local bank and from the U. S. National Bank in Roseburg after the plant was shut down (Tr. 192). There is no evidence of any effort to obtain financing after the decision was made in June to sell the mill (Tr. 57). Finding XVI correctly states that "from that time forward it actively sought to find a possible buyer or lessee thereof and invited offers therefor." (Tr. 57). There is no evidence that any efforts were made to obtain financing after the market improved in June, 1954.

V

The court erred in entering Finding XXIII (Tr. 59) that at the time Sutherlin ceased operations and at the

time of the sale Sutherlin had "become disabled through no fault of its own from furnishing plaintiff with any output of said mill or honoring plaintiff's orders for plywood." There is no evidence that Sutherlin ever tried to operate after the market improved in June, 1954, or that it was disabled from performing.

VI

The court erred in entering Finding XXII (Tr. 59) that Sutherlin acted in good faith and in the exercise of reasonable business judgment in selling its mill and that it had no alternative but to sell or face continued losses and ultimately bankruptcy. There is no evidence that Sutherlin displayed any good faith by attempting to operate and comply with its contract with appellant after the tremendous market improvement occasioned by the strike in the industry in June, 1954. There is absolutely no evidence that Sutherlin would have had continued losses or ultimately bankruptcy if it had operated. The evidence shows that the same mill was successfully and profitably operated by Nordic without the advantages which Sutherlin had i.e. financing of veneer purchases and advances on accounts receivable. Sutherlin simply chose to disable itself from further performance by selling its mill rather than continuing operation as Nordic proved was feasible and profitable.

VII

The court erred in entering Finding XXVI (Tr. 60) that Nordic did not induce Sutherlin to sell said mill and in failing to find that Nordic interfered with appellant's contract rights by participating in the act which disabled Sutherlin from performing its contract with appellant. The undisputed evidence is that Nordic knew that after its purchase of the mill Sutherlin would be unable to furnish plywood to appellant (Tr. 60) and that such purchase would make it impossible for Sutherlin to perform its contract with appellant (Tr. 135).

VIII

The court erred in entering Finding XXVII (Tr. 60) that there was no collusion between Sutherlin and Nordic to destroy appellant's rights in its contract with Sutherlin and that Nordic had no intent to damage appellant or destroy its rights in said contract. There is no evidence to support this finding. The evidence is that the officers of Nordic knew its purchase of the Sutherlin mill would destroy appellant's rights in said contract (Tr. 132, 135), but they nevertheless participated in the sale which disabled Sutherlin from carrying out its contract.

IX

The court erred in entering Conclusion of Law II (Tr. 63) that Sutherlin did not agree to continue pro-

duction for any period of time and in the event conditions made it unprofitable it was to be relieved from continuing production. The contract expressly stated that it was to be in full force and effect for 50 months with an extension of three months for each $3,000.00 advanced over the original loan of $50,000.00. Since $30,000.00 additional was advanced, the contract was by its express language to continue for 60 months. The contract itself, the burdens imposed upon appellant and every reasonable intendment of the evidence show that it was intended by the parties that Sutherlin would continue in operation for the term of the contract.

X

The court erred in entering Conclusion of Law III (Tr. 64) that the contract did not divest Sutherlin of the right to dispose of its physical assets. The contract is not open to such a construction. By express provision of the contract Sutherlin agreed to continue in force its promise to provide appellant with 80% of its output for 60 months. Under the contract Sutherlin did not have the right to disable itself from performance by selling its mill thereby rendering performance impossible.

XI

The court erred in entering Conclusion of Law IV (Tr. 64) that appellant failed to prove that Sutherlin

guaranteed, promised or represented to appellant that it would continue in operation for at least 50 months. The contract by its express terms bound Sutherlin to continue the contract in force for at least 50 months.

XII

The court erred in entering Conclusion of Law V (Tr. 64) that appellant failed to prove that Sutherlin acted in bad faith in ceasing operations or selling its mill. The officers of Sutherlin admitted that they knew that the sale of the mill would disable Sutherlin from performance of its contract with appellant. There is no evidence that Sutherlin tried to operate after it shut down on April 21, 1954 and after June, 1954 it exerted all its efforts to sell the mill and destroy the subject matter of the contract thereby making performance impossible.

XIII

The court erred in entering Conclusion of Law VI (Tr. 64) that Sutherlin did not breach the contract with appellant by terminating production or by selling its physical assets to Nordic or by failing to furnish appellant 80% of the output of the mill after Nordic commenced operating. The contract provided that it would remain in full force and effect for at least 50 months and the only reasonable construction of the contract is that the parties intended that Sutherlin would continue op-

eration for at least 50 months. By failing to do so, Sutherlin did breach its contract with appellant.

XIV

The court erred in entering Conclusion of Law VII (Tr. 65) that Sutherlin was excused from furnishing appellant with further production and from honoring further orders of appellant by reason of its financial losses, insolvency and inability to produce further. Financial losses have never before been held to be an excuse for performance of a contract. There is no evidence that Sutherlin was insolvent and Exhibits 5 and 131 show that Sutherlin was not and is not insolvent. Its assets have at all times exceeded its liabilities. It has at all times had a substantial net worth and still has a net worth of approximately $375,000.00. There is no evidence that Sutherlin was unable to produce further and the fact that Nordic was able to produce in the same mill under less favorable conditions indicates that Sutherlin could likewise have produced. Neither insolvency nor inability to perform are an excuse for breach of contract, particularly where inability to perform is occasioned by the promissor voluntarily disabling itself from performance.

XV

The court erred in entering Conclusion of Law VIII (Tr. 65) that appellant failed to prove that Nordic inter-

fered with said contract, induced a breach thereof or conspired with Sutherlin to destroy appellant's rights in such contract. Admittedly, Nordic knew of Sutherlin's contract with appellant and knew that its purchase of Sutherlin's mill would disable Sutherlin from performing its contract with appellant. By purchasing Sutherlin's mill Nordic interfered with appellant's contract rights and participated in and induced the breach by Sutherlin.

XVI

The court erred in entering Conclusion of Law IX (Tr. 65) that Nordic "did not unlawfully interfere with said agreements or induce a breach thereof or conspire with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein and was not bound by them. It was privileged to purchase the physical assets of defendant Sutherlin Plywood Corporation." The evidence shows that Nordic did unlawfully interfere with said contract, induced the breach thereof and conspired with Sutherlin to destroy appellant's rights in said contract by entering into an agreement with Sutherlin to purchase Sutherlin's mill with the knowledge that said purchase would destroy the subject matter of appellant's contract and render performance by Sutherlin impossible. There is no contention that Nordic was a party to the contract between Sutherlin and appellant and

the claim against ~~Sutherlin~~ Nordic is that it is liable in tort to appellant. The conclusion that Nordic was not bound by said contract is not within the issues of this case. There is no law which grants Nordic any privilege to interfere with appellant's contract rights.

XVII

The court erred in entering Conclusion of Law XI (Tr. 66) that appellant is entitled to no affirmative relief or damages against Sutherlin for breach of said contract. The evidence is that Sutherlin did breach said contract and should be required to respond in damages.

XVIII

The court erred in entering Conclusion of Law XII (Tr. 66) that appellant is entitled to no affirmative relief or damages against Nordic. The evidence shows that Nordic interfered with appellant's contract rights and it should be compelled to respond in damages.

XIX

The court erred in entering Conclusion of Law XV (Tr. 66) that plaintiff is not entitled to judgment against Sutherlin and Nordic and for the costs and disbursements herein incurred. The evidence and applicable law shows that appellant is entitled to judgment against Sutherlin and Nordic for damages and for the costs and disbursements herein incurred.

XX

The court erred in failing to find and conclude:

1. That Sutherlin breached its contract by discontinuing operation in April, 1954 and by selling its mill to Nordic in September, 1954 thereby disabling itself from performance of its contract with appellant.

2. That Nordic interfered with appellant's contract rights and induced a breach of appellant's contract by purchasing Sutherlin's mill thereby disabling Sutherlin from performing its contract with appellant.

3. That appellant is entitled to recover damages of $72,000.00 from Sutherlin and Nordic and an additional $20,000.00 from Sutherlin.

4. That Nordic should be enjoined from selling the product of the mill to anyone other than appellant pursuant to the terms of its contract.

And the court erred in failing to enter judgment in accordance with the above.

ARGUMENT

I

The trial court erred in failing to find and conclude that Sutherlin breached its contract with appellant by failing to continue in production after April 21, 1954, and by selling its mill to Nordic on September 7, 1954.

SUMMARY

A. The contract expressly requires Sutherlin to continue to operate for at least 50 months.

B. Even if it did not expressly require Sutherlin to continue in production for at least 50 months, the contract should be construed as implying that continuous operation for the term of the contract is required.

C. The grounds on which the trial court absolved Sutherlin of liability are erroneous and the record contains no other basis which will support the trial court's conclusion.

D. There is no proof that Sutherlin was insolvent, but neither insolvency nor financial difficulties excuse performance or justify the conclusion that a contract can not be performed.

A. The contract as a whole clearly shows that Sutherlin was obligated to continue its operation for the time of the contract.

The most important provisions on the issue of continuous operations are paragraphs three and four on page three of the contract. These paragraphs are as follows:

"This sales contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months, but this agree-

ment shall be extended one month for each $3,000.00 advanced over said $50,000.00 but under no circumstances shall expire until the mortgage by Party of the First Part to Oregon Plywood Corporation shall be paid in full.

IT IS UNDERSTOOD AND AGREED that if the Party of the First Part is unable to produce because of fire, earthquake, disaster or act of God, this contract shall continue in full force until the mortgage heretofore mentioned is paid in full."

The fourth paragraph is very significant for when read with the third it denies to Sutherlin certain excuses for nonperformance which otherwise might have been operative. It holds Sutherlin to a standard of performance for at least 50 months even though Sutherlin is temporarily unable to operate because of fire, earthquake, disaster or act of God unless Sutherlin pays its mortgage to us in full. We shall demonstrate this by showing the application of these two paragraphs in situations where they were intended to operate are repugnant to the notion that Sutherlin promised only to continue in production if in good faith it could produce; see *Great Lakes & St. Lawrence Transportation Co. vs. Scranton Coal Co.*, 239 Fed 603, 607.

Let us consider the application of these two paragraphs in a situation where Sutherlin could not produce

because of fire damage to its mill. Let us also assume that the inability to produce would be only temporary and that production would soon be forthcoming upon repair of the fire damage. Such a situation falls within paragraph four and in such a case that paragraph provides that the contract will remain in full force. Consequently, the contract by its terms would remain in full force even though production had been stopped temporarily because of fire. In other words, temporary inability to produce was not to relieve Sutherlin from the duty to continue in operation. If temporary inability to produce was not to relieve Sutherlin from continuing production, *a fortiori* it was not to be excused where fire, earthquake, etc. had not prevented production.

Other provisions of the contract clearly indicate that Sutherlin was to remain in continuous production during the term of the contract. The fourth paragraph on page two provides for deferment of payments on Sutherlin's mortgage in the event Sutherlin does not operate because we do not furnish sufficient orders to enable Sutherlin to dispose of 80% of its production. It provides that mortgage payments are to resume when we furnish orders sufficient to enable Sutherlin to operate continuously for a period of two weeks. This provision shows that the parties intended that Sutherlin was to be excused from continuous operation if appellant failed to

furnish orders, but continuous operation was to resume when appellant furnished orders for two weeks production. It is implicit in that provision that the mill was to resume continuous operation as soon as appellant furnished the orders for two weeks' production.

Paragraph three on page two requires appellant to maintain a 30 day order file at the mill. Surely the parties did not intend that Sutherlin was free to disregard these orders. They expressly covenanted that this contract "shall be in full force and effect from the beginning of production" by Sutherlin "and continue for at least 50 months." And in paragraph one on page one Sutherlin agrees to accept . . . and ship" appellant's orders "as specified and within a reasonable time." The only reasonable interpretation of these provisions is that Sutherlin would accept and ship appellant's orders for the term of the contract. It is clear that it was intended by the parties that Sutherlin would continue in operation for the term of the contract.

Only one more provision in the contract need be considered on the requirement that Sutherlin continue in operation for the term of the contract. That is the last paragraph on page two. It reads:

"Party of the First Part shall have the right to reject any orders placed with it by Party of the Second Part, provided specifications are not up to production condi-

tions, nor if unprofitable. All orders shall be deemed accepted unless same shall have been rejected and notices of rejection received by Party of the Second Part within forty-eight (48) hours from receipt of order by Party of the First Part."

It seems that the word "or" should have been used instead of the word "nor." The word "unprofitable" refers to orders with specifications which would make the particular order unprofitable. The word unprofitable is restricted in meaning by the context in which it appears and refers to unprofitability resulting from specifications not being up to production conditions. The reference to specifications not being up to production conditions refers to a situation where the specifications of the orders submitted are not of the kind which the equipment in Sutherlin's mill was designed to cope with as was the case with one of our orders for oiled and edge-sealed plywood (Tr. 155). Interpreting the word "unprofitable" in context it refers to particular orders which would be unprofitable because they were not of the kind which the mill could produce without changes in production conditions.

There are three reasons why we believe this interpretation of that paragraph is correct and what the parties intended. First, it is not reasonable to assume that the parties intended to undo the implications of the

other provisions of the contract which require continuous production. Second, if the parties had intended that Sutherlin was not required to operate in any instance where operation would be unprofitable, the parties would not also have provided that orders need not be filled when their specifications were not up to production conditions. The mere reference to unprofitability would have been sufficient. The third reason is that except for a single short utterance by defendants' counsel during the trial the defendants did not even mention this sentence during the trial let alone rely on it in defending this action. The instance to which we refer appears on page ninety-four (94) of the transcript:

> "Mr. Yerke: But you are going also to have to establish, Mr. Anderson, in view of the provisions of your contract that the orders would also have been profitable to Sutherlin Plywood Corporation because Sutherlin under the provisions of your contract had the right to refuse any orders which were unprofitable.
>
> Mr. Anderson: Well, that point—.
>
> The Court: I am going to let the evidence in."

The trial moved on before we could offer our interpretation of this sentence. This is the only instance where this provision in the contract was mentioned either by counsel for appellees or by appellees' witnesses.

If appellees really believed that this provision was intended to excuse production where it was unprofitable generally, surely their officers who testified below displayed an extraordinary capacity for self-control in constraining within themselves this bit of information which should have burst from their lips in righteous indignation.

The terms of the loan as shown in Exhibit 2 correspond with the term of the output contract and support our contention that the parties intended Sutherlin to operate for the full term of the contract. Exhibit 2 provides that the initial loan of $50,000.00 was to be repaid by Sutherlin at the rate of $1,000.00 per month. This would require 50 months for repayment—exactly the same term as the sales contract. In an identical factual situation the Court of appeals for the Third Circuit held that this fact indicated that it was intended or implied that operations would continue for five years.

In *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F2d 117 (CCA-3 1929) plaintiff agreed to loan defendant $100,000.00 to construct a new plant. Defendant agreed to purchase its requirements of soda ash, caustic soda and bicarbonate of soda from plaintiff, "which agreement shall continue for a period of five years." Defendant sold its business and failed to have any further requirements. In deciding "whether or not under the

terms of this contract there was an obligation on the part of the defendant to continue in business for five years and buy its supplies from the plaintiff during this time" the court said:

> "The $100,000 to be loaned to the defendant by the plaintiff was to be used by the defendant in the erection of a plant at Fairport. The notes were to be paid each six months after the other. There were ten of these notes, and that last was payable five years after the date thereof. This fact seems to indicate it was anticipated, intended, or implied that the operating contract between them was to continue for at least five years during which these notes were running and being paid off."

Summarizing, Sutherlin promised to continue in production for at least 50 months. Sutherlin promised that it would "accept . . . and ship" appellant's orders "as specified and within a reasonable time" and that "this contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months." This alone requires Sutherlin to continue in production for 50 months, but construed in the light of the other provisions of the contract, no other construction is reasonable.

B. We do not for a minute suggest that this case turns on the rule which would apply here if the contract were silent on Sutherlin's obligation to operate and have

an output. The following discussion is offered only to show the fallacy of argument which appellees may make. We submit that the contract here expressly requires Sutherlin to continue in operation and to have an output. Consequently, the rules presently to be discussed do not apply to this case. This court need not consider the problems raised by the authorities cited if it decides, as we think it must, that the contract requires Sutherlin to continue in operation for the term of the contract.

Where an output contract is silent on the question of whether continuous operations are required, the cases reveal four patterns of interpretation. In this discussion we will use cases involving requirements contracts, the converse of an output contract, interchangeably with cases involving output contracts, as Williston does, to illustrate the nature of the obligations which either type imposes.

The four patterns of cases are found in 1 Williston on Contracts (2 Ed.) 355-59. In the first pattern the buyer bargains only for a monopoly of the seller's output if there is one. Consequently, the seller in accordance with the understanding between him and the promisee is free to produce or not, as he sees fit. The following cases come within this category:

Imperial Refining Co. v. Kanotex Refining Co., 29 F 2d 193

Ramey Lumber Co. v. John Schroeder Lumber Co., 237 Fed 39

Texas Co. v. Pensacola Maritime Corporation, 279 Fed 19

Mason-Walsh-Atkinson-Kier Co. v. Stubblefield, 99 F 2d 735

Petroleum Refractionating Co. v. Kendrick Oil Co., 65 F 2d 997

H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co., 194 Fed 69

Drake v. Vorse, 52 Ia 417, 3NW 465.

In the second pattern the meaning given to the output promise is that the seller is required to act in good faith with respect to his ouput and to sell it to the buyer if he has one. Thus, it will be seen that something more is required here than is required in the first pattern. Good faith would presumably prevent the seller from choosing to cease production without reason or justification. The following cases fall within this classification:

In re United Cigar Stores Co., 8 Fed Supp. 243

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corporation, 130 F 2d 471

McKeever, Cook & Co. v. Canonsburg Iron Co., 138 Pa. 184, 16 A 97, 20 A 938

Willapa Electric Co. v. S. L. Dennis Construction Co., 168 Wash 416, 12 P 2d 609

Helena Light & Railway Co. v. Northern Pacific Railway Co., 57 Mont 93, 186 Pac 702.

In the third pattern, the meaning given to the output promise is that the promisor undertakes to produce and sell his normal output. The following cases are of this type:

Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed 298

Robertson v. Miller, 286 Fed 503

Minnesota Lumber Co. v. Whitebreast Lumber Co., 160 Ill 85, 43 NE 774

Wells v. Alexander, 130 NY 642, 29 NE 142

Hickey v. O'Brien, 123 Mich 611, 82 NW 241.

The second and third patterns involve what the courts sometimes refer to as "ordinary" cases, that is, situations where the only substantial commitments of both parties are the mutual promises to buy and sell. Cases in the second and third patterns which the courts do not expressly refer to as ordinary are, upon examination, nevertheless seen to be ordinary.

In the fourth pattern, the Courts interpret the output promise to require continuous production because the otherwise disproportionate burdens of the contract upon the buyer, such as where he has advanced large loans, constructed expensive buildings or forgone other substantial marketing opportunities, indicate that the parties as reasonable men intended continuous production.

A study of these four patterns indicates that there is only one dichotomy in this whole area of case law, an area in which litigation has been very intensive. That is found in the second and third patterns. In the second pattern where there is silence as to continuous operations, good faith is the only measure of the output seller's obligation. However, in the third pattern, normal output is required. (In the first pattern the output promisee is interested only in a monopoly of the seller's product. *Ramey Lumber Co. v. John Schroeder Lumber Co.*, 237 Fed 39 is a case of this type.)

Cases in the second and third patterns are ordinary cases, but in the fourth pattern the substantial commitments of the buyer take the case out of the ordinary category as in *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 F 2d 117 where the promisee loaned the output seller $100,000.00 in addition to the usual consideration, and *Texas Industries v. Brown*, 218 F 2d 510 where the promisee constructed a large and expensive plant in contemplation of fulfilling his obligations under the contract.

A leading case involving the ordinary situation is *In Re United Cigar Stores Co.*, 8 Fed Supp 243. Dealing with the obligation of a requirements buyer, the Court said that "A provision that he shall continue to have requirements is not ordinarily implied." 8 Fed Supp 243, 245. But note that the case was an ordinary one; the

only substantial commitments of the parties were their mutual promises to buy and sell.

The present case falls within the fourth pattern. In addition to purchasing the output, appellant was committed to make advances for the purchase of veneer (these amounted to $214,346.87 in three months, Tr. 62), to loan Sutherlin $80,000.00 and to make advances against accounts receivable. This case comes within the rule of *Diamond Alkali Co. v. P. C. Tomson Co.* 35 F 2d 117 and *Texas Industries v. Brown*, 218 F2d 510.

In *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 F 2d 117 (CCA-3 1929) defendant agreed to purchase its entire requirements of soda ash, caustic soda and bicarbonate of soda from plaintiff, "which agreement shall continue for a period of five years from January 1, 1926."

Plaintiff loaned defendant $100,000.00 to construct a new plant. Defendant operated and purchased its requirements from plaintiff for about one year and a half. Then it sold its business and ceased to have requirements. In holding that the sale of its plant constituted a breach of contract, the court said at p. 120 of the opinion:

> "When the defendant sold, not the Philadelphia real estate, but the manufacturing assets and good will coupled with an express agreement not to

> engage in business for five years, it put itself in a position in which it could not carry out its contract with the plaintiff, and so breached it."

The language of the contract relating to its term is set forth on p. 117 of the opinion and provides that defendant was to purchase "the entire requirements of The Tomson Company of soda ash, caustic soda, bicarbonate of soda, according to the terms and conditions in said agreement (attached to the contract specifying grades of material, manner of packing, times of payment, etc.), *which agreement shall continue for a period of five years from January 1, 1926.*" (Emphasis ours). This is strikingly similar to the present contract which provides that it "shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months."

The court held that the contract required defendant to continue in business and operate for the term of the contract. At p. 119 the court said:

> "Was it intended and implied by the parties that the defendant would continue in business and operate for five years? There was a period during which it was understood that 'the term of this contract' was to run. There is no intimation that 'the term' was to be other than the five years mentioned."

Likewise, in our case there was a period during which it was understood that the contract was to run and there is no intimation that the term was to be other than the 50 months mentioned.

At p. 119 the court said:

> "All the negotiations between the parties, the entire contract with all its covenants and the entire enterprise of the parties were based upon the proposed 'continuance' of the contract for 'the term' of five years. The fulfillment of their undertakings necessarily implied such a continuance. The parties in good faith contemplated performance of the covenants requiring the defendant to purchase all its specified supplies from the plaintiff for five years and implicit in these negotiations and stipulations was the bona fide operation by the defendant of its manufacturing plant at Fairport for that period. The defendant did not intend to do otherwise until an unexpected opportunity to make 'an advantageous sale' presented itself."

In the present case "an advantageous sale" opportunity presented itself to Sutherlin when the plywood market improved in the summer of 1954. And as in the Diamond Alkali case the sale disabled Sutherlin from carrying out its contract.

Also on p. 119 of the opinion the following appears:

> "Whenever a contract cannot be carried out in the way it was obviously expected that it would be carried out without one party or the other perform-

ing some act not expressly promised by him, a promise to do that act must be implied. 3 Williston on Contracts, p. 2341; E. I. Du Pont, etc., Co. v. Schlottman (C.C.A.) 218 F 353; Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co. (C.C.A.) 239 F 603. The fact that the contract did not in express terms say that the defendant would continue in business for five years did not relieve it from performing their mutual intention as indicated by the express covenants, and in order to do so, it had to continue in business. Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co., supra; Wells v. Alexander, 130 N.Y. 642, 29 N. E. 142, 15 L. R. A. 218; Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C.C.A.) 121 F. 298, 61 L. R. A. 402."

In the recent case of *Texas Industries, Inc. v. Brown*, 218 F 2d 510 (CA-5 1955) appellant had a contract with the first group of appellees to supply its requirements of light aggregate for three plants for five years. While the contract still had 44 months to run the three plants were leased to the second group of appellees which refused to accept further deliveries under the contract. The trial court held that there was no breach of the contract and no inducement to breach. In reversing Holmes, J. said at p. 512:

"In our opinion, neither a sale nor lease of the three block plants, nor an assignment of the contract, by the buyers could in law effectuate a release of their obligations under the contract without the

consent of appellant. The written agreement shows on its face that the requirements of the three block plants were the subject matter of the sale, and were within the contemplation of the parties. The plants have not been sold; they have not been shut down; they have not been dismantled; they have never ceased to operate and to have requirements. They are operating under a lease from the Browns, who signed the contract and who are still very much interested as individuals in the operation of the plants. Much of the value of the rights reserved to the lessor under the lease depends upon the continuing operation of the plants.

"In these circumstances, the law of Texas imposes an implied obligation upon the buyers to keep the plants in operation lest, by disposing of them or shutting them down, the buyers be permitted to destroy the subject matter of the contract, the requirements of the plants, in violation of the intention of the parties that sales and purchases under it would continue for the full term thereof. This rule was recognized in a decision of the Supreme Court of Texas in 1951, Portland Gasoline Co. v. Superior Marketing Co., Inc., 150 Tex. 533, 243 S. W. 2d 823, 825, wherein was cited Williston on Contracts, Rev. Ed., Vol. 1, pp. 357-358, which refers to a class of cases that finds from the business situation, from the conduct of the parties, and from the startlingly disproportionate burden cast upon one of them, a promise implied in fact by the seller to continue in good faith sales or production, or on the part of the buyer to maintain his business or plant as a going concern, and to take its bona fide requirements. 'In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party'."

In the present case there is (even without the express provisions of the contract) "a promise implied in fact by the seller to continue in good faith sales or production" and to maintain its "business or plant as a going concern."

C. The trial court was of the opinion that Sutherlin was excused from performing "by reason of its financial losses, insolvency and inability to produce further" (Conclusion VII). Note that there is no finding of insolvency and the evidence shows that Sutherlin was not insolvent at any time.

There is no evidence in the record and no finding that Sutherlin was disabled from performing for the life of the contract. The only finding of fact relative to Sutherlin's inability to perform is that it was disabled from performing at the time of the sale and at the time it ceased operations (Finding XXII, Tr. 59). But there is no evidence in the record to support this finding and every reasonable inference from the evidence is that Sutherlin could have performed. Nordic proved this by successfully operating the plant on capital of $20,000.00.

There is absolutely no evidence of permanent inability of Sutherlin to perform. There is some general testimony that Sutherlin tried and failed to obtain working capital at sometime or times after April (Tr.

179, 192-193). But when? There is not one shred of evidence as to when these attempts were made or how much was needed, and no explanation is offered as to Nordic's successful operation of the same plant with far less financial backing than Sutherlin had, but with liabilities three times as great as Sutherlin's. Sutherlin's liabilities on May 31, 1954, were $213,270.10 (Ex. 5, 131) and Nordic's liabilities on September 30, 1954, were $679,319.19 (Ex. 6, 133)!

In the absence of evidence concerning when these unsuccessful attempts were made, it is clear that we do not know whether they were made from June to September 1954 when the demand and prices for plywood were at an unprecedented high and when Nordic managed to obtain financing to run the mill.

In view of Sutherlin's continuing duty to try to get its mill in operation, and since there is no evidence that it could not obtain working capital to do this at all times or at any specific time, between April and September, 1954, it is perfectly clear that a finding that Sutherlin was unable to perform during the remaining life of the contract would be unwarranted by anything in the record. If the court's finding that Sutherlin was disabled from performing at the time of the sale (Finding XXII) means that Sutherlin was disabled from performing for the life of the contract, it is wholly unsupported by the

evidence. If that finding means that Sutherlin was merely temporarily disabled, that would, of course, not support the judgment.

As our Exhibits 27 and 28 and the undisputed testimony of Henry L. Thompson shows (Tr. 140) the market price of plywood was at a low of $76.00 until the middle of June, 1954, having dropped from $85.00 since January, 1954. This probably explains the testimony of Steinbach, secretary of Sutherlin, that when certain officers of Sutherlin contacted the local bank and the U. S. National Bank in Roseburg for a loan, they were told that it probably would not be possible for Sutherlin to get a loan from any other bank (Tr. 192). But it is obvious that financing could have been obtained after the price and demand for plywood soared to the highest in the history of the industry following the strike in June, 1954 (Tr. 88). But we don't have to speculate as to whether financing was available in those market conditions. Nordic's operation, its balance sheets and income statements (Ex. 6, 133) prove that it was.

The hard and simple fact of the matter is that Nordic got the mill going with $20,000.00 cash, $7,000.00 less than the average monthly payroll of Sutherlin during the time it operated (Tr. 184), and far less than the cost of veneer which would have been financed for Sutherlin by appellant under the contract (Ex. 2).

We wish to clearly spell this out. The initial investment of Adams and Jacobson in Nordic was $50,000.00 (Tr. 231). Of this, $20,000.00 was paid to Sutherlin (Ex. 122, pp. 1 h). Nordic's balance sheet as of September 30, 1954 (Ex. 6, 133) shows that another $10,000.00 was subscribed and unpaid capital stock during the first month of operations (D Ex. 133), which leaves $20,000.00 in cash to get the mill in operation. Nordic financed its accounts receivable through a bank (Tr. 232), while the contract (Ex. 1) required appellant to finance Sutherlin's accounts receivable at no charge. To top it all off, Nordic had a tremendous disadvantage which Sutherlin did not have. Nordic had to purchase green veneer with its own funds (Tr. 231). During the first three months this came to $39,835.61, $92,794.11 and $97,500.82 (Ex. 133). Sutherlin would not have have had those outlays for veneer because appellant was required to purchase the veneer for it (See Exhibit 2). Nordic borrowed heavily from banks to finance its operations. See its balance sheets for October, November and December, 1954, (Ex 6, 133). And all of these loans, it must be remembered, came at a time when Nordic was mortgaged to the hilt to Sutherlin for over $600,000.00.

These are the facts which the trial court failed to recognize. $20,000.00 or less in cash was all that was

needed to reopen the mill. We would have provided several times this amount each month in veneer purchases for Sutherlin. We would have sold its plywood, sparing it this effort which Nordic had to put forth. We would have financed its accounts receivable saving interest charges. The only thing that Sutherlin had to do was operate the mill. Cash for its payroll would have been forthcoming almost as soon as the cars of plywood left the plant and before the payroll was due. Nordic's operation of the same mill was successful and its success is not difficult to explain. The market was at an all time high (Tr. 88). Sutherlin could have done even better because of its advantages under the contract with appellant.

All that this Court need conclude is that evidence is lacking to support the conclusion that Sutherlin was permanently disabled from operating because it had so-called financial difficulties. As we have demonstrated, there is no evidence in the record to support this conclusion and this Court should rule that Sutherlin was not excused from performance by its flimsy contention of financial difficulty.

Turning to Sutherlin's liabilities, its balance sheet of May 31, 1954 (Ex. 5) shows liabilities of approximately $213,000.00. Of this Sutherlin owed us $77,000.00 leaving $136,000.00 owing to others (See D. Ex.

134). These liabilities do not account for Sutherlin's inability to reopen. For the creditors to whom they were owing were willing to wait and receive payment from the operations of the mill. They did wait for payment and were paid out of the money paid by Nordic to Sutherlin. Of the $136,000.00 owing to creditors besides ourselves, how much was currently due and owing from April to September, 1954? The defendants chose not to tell the court. Surely, if we do not know the amount of Sutherlin's debts which were due or to become due, we do not know whether Sutherlin could have met them in the ordinary course of business and, therefore, we do not know whether it was insolvent in the sense that it could not meet its current liabilities as they became due. Although Sutherlin had liabilities of only $213,270.10 (May 31, 1954 balance sheet, Ex. 5, 131), Nordic had liabilities on September 30, 1954 of $679,-319.19 (Ex. 6, 133), three times as great! Was Nordic disabled from continuing production? Of course not and neither was Sutherlin.

Furthermore, there is no showing that the value of Sutherlin's total assets was less than its total liabilities during the period involved. According to Sutherlin's May 31, 1954 balance sheet its liabilities were $213,270.10 (Ex. 5, 131). Its mill was sold for $660,-000.00. The value of its assets exceeded liabilities by $446,729.90!

Let us now examine those few debts which Sutherlin chose to elaborate in illustrating its so-called financial hardships and the asserted severity with which the creditors were about to exact their due. Did any of these creditors try to obtain a judgment lien? The answer is in the testimony of Steinbach, secretary of Sutherlin, (Tr. 120):

> "Q. What I am asking is whether at the time you shut down in April there were then pending any lawsuits? Had anybody sued Sutherlin at that time?
>
> A. Oh, no.
>
> Q. Pardon?
>
> A. No, sir.
>
> Q. Has anybody sued Sutherlin since that date other than the plaintiff in this case?
>
> A. No, sir; not to my knowledge."

All the sound and fury about financial difficulty subsides to an inaudible whisper in the face of this mute but eloquent testimony by the creditors.

D. There is no proof that Sutherlin was insolvent, but neither insolvency nor financial difficulty would excuse Sutherlin's non-performance of its contract.

The court concluded that "Defendant Sutherlin Plywood Corporation was excused from furnishing

plaintiff with further production of plywood and from honoring further orders of plaintiff by reason of its financial losses, insolvency and inability to produce further (Conclusion of Law VII Tr. 65)."

That this erroneous conclusion is the basis for the trial court's denial of appellant's claim is made clear by the following colloquy at the conclusion of the trial (Tr. 254):

> "Mr. Anderson: Is your Honor holding that financial difficulties are an excuse for performance?
>
> The Court: Yes, I am holding precisely that."

We believe there is absolutely no authority for the holding that financial difficulties of a promisor excuse his performance of contractual obligations.

The following indicates that no such excuse is recognized in Oregon:

> "The fact that the work was more expensive than plaintiff or any one else anticipated is no excuse for his failure to comply with the terms of the contract." *Hanthorn v. Quinn*, 42 Or 1, 13, 69 Pac 817 (1902).

The court's conclusion that financial difficulties excused Sutherlin's performance is clearly erroneous and requires that this decision be reversed.

II

The court erred in failing to find and conclude that Nordic tortiously interfered with and induced a breach of appellant's contract with Sutherlin.

SUMMARY

A. Nordic tortiously interfered with appellant's contract with Sutherlin and wilfully induced a breach thereof.

B. The grounds on which the trial court absolved Nordic of liability are erroneous and the record contains no other basis which will support the trial court's conclusion.

C. There is a presumption that Sutherlin's contract can be performed and there is no evidence to the contrary.

A. Nordic tortiously interfered with appellant's contract with Sutherlin and wilfully induced a breach thereof.

Nordic's President, John R. Adams, and its Secretary-Treasurer, Norman H. Jacobson, admitted that they knew of Sutherlin's sales contract during the negotiations for the sale, and that Nordic's purchase of the mill would disable Sutherlin from performance of that contract (Tr. 132, 135). Yet, Nordic actively solicited the purchase of the mill (Tr. 230), made an offer (Tr. 129) and consummated the purchase in September, 1954 (Tr. 27). Nordic never intended to furnish

appellant the output of the mill (Tr. 28) to which it was entitled under the contract.

Nordic pursued an active course of conduct which it *knew* would result in the destruction of appellant's contract rights. It admits and stipulates in the agreed facts that it knew its purchase of the Sutherlin mill would disable Sutherlin from furnishing plywood to appellant (Tr. 31) and that Sutherlin "would not be able to comply with the contract" (Tr. 133) after the sale of the mill.

Under these circumstances, it seems clear that Nordic tortiously interfered with appellant's contract and wilfully induced a breach thereof. Prosser on Torts (2d Ed.) 729.

B. The grounds on which the trial court absolved Nordic are erroneous, and the record contains no other basis which will support the trial court's conclusion.

We believe we have established that Sutherlin was bound to continue in operation and sell us 80% of its output during the term of the contract. The record is undisputed that Nordic knew of this contract and knew that Sutherlin could not perform it if the mill was sold. Nordic nevertheless successfully induced Sutherlin to sell its mill to it by making an offer to purchase which Sutherlin accepted. In view of these undisputed facts,

Nordic intentionally induced a breach of contract and, consequently, must respond in damages to the extent that they have resulted from the breach. The tort of interference with contractual relations is recognized in Oregon; *Ringler v. Ruby* 117 Or 455, 244 Pac. 509.

The trial court held that Nordic did not tortiously interfere with out contract with Sutherlin apparently because it thought that Sutherlin was excused from performing. According to the trial court, since Sutherlin's non-performance was excused, so was Nordic's conduct interfering with out contract and inducing non-performance. The validity of this conclusion is doubtful even if the trial court had been correct in concluding that Sutherlin's non-performance was excused. It is the rule that unjustified interference with a contract which the promisor is privileged not to perform, such as contracts which are terminable at will or unenforceable because they do not comply with the statute of frauds, is nevertheless wrongful. Prosser on Torts (2d Ed. 1955) 725-26.

However, notwithstanding this, as we have demonstrated, Sutherlin was bound to continue production and sell to us during the life of the contract. Its nonperformance was not to be excused except on grounds which traditionally excuse non-performance. Financial difficulty is not one of these grounds. Since Sutherlin's

non-performance was not excused, the trial court's conclusion that Nordic's conduct did not interfere with our contract rights is erroneous. There are no other grounds in the record which support the trial court's conclusion that Nordic "did not unlawfully interfere with said agreements or induce a breach thereof" (Conclusion IX). The evidence is undisputed that Nordic purchased the Sutherlin mill and that the purchase made it impossible for Sutherlin to carry out its contract with appellant.

C. There is a presumption that Sutherlin's contract could be performed but for the interference by Nordic.

The following appears in Prosser on Torts (2d Ed. 1955) at p. 725:

> "The law of course does not object to the voluntary performance of agreements merely because it will not enforce them, and it indulges in the assumption that unenforceable promises will be carried out if no third person interferes. Accordingly, it is usually held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms still afford a basis for a tort action when the defendant interfers with their performance."

If the law assumes that even unenforceable contracts will be performed if no third person interferes,

there is an *a fortiori* presumption that an enforceable contract, such as this one, would have been carried out if Nordic had not interfered by intentionally participating in the act which disabled Sutherlin from performing.

There is no evidence that Sutherlin would not have continued production if Nordic had not purchased the mill. With price and demand for plywood at an unprecedented high level, Sutherlin could have produced if it had tried. Nordic's purchase of the mill destroyed the possibility of performance. Having made Sutherlin's performance impossible, Nordic should not now be heard to say that Sutherlin might not have performed anyway. Furthermore, Nordi's operation in the same mill shows that Sutherlin could have operated if it had tried.

III

The court erred in failing to find that Sutherlin and Nordic are responsible to appellant for damages.

SUMMARY

A. Sutherlin and Nordic are liable to appellant for damages in the amount of $72,000.00 up to the time of trial. Sutherlin is liable to appellant for an additional $20,000.00 up to the time of trial.

B. Further proceedings should be had in the trial court to fix the amount of damages between the time of trial and the date of the judgment.

The proper measure of damages to be assessed against Sutherlin is the profit appellant would have made had performance been forthcoming less expenses which appellant would have incurred in making that profit. *Fayette Kanawha Coal Co. v. Lake & Export Coal Corporation* 91 W. Va. 132, 112 SE 222; Restatement of Contracts Sec. 329.

After Sutherlin closed its mill, we could not place orders with others on the same terms as those in our contract with Sutherlin (Tr. 145). The 60 month contract would not have expired until 1959. Appellant had available and could have submitted to Sutherlin $100,000.00 in orders per month from the shut down of the mill on April 21, 1954 until the strike in June, 1954 (Tr. 91, 140). After the strike in June, 1954 appellant had available and could have submitted orders in the amount of $200,000.00 each month (Tr. 92, 141).

While the evidence is that we could have submitted orders in the amount of $200,000.00 after the strike in June, 1954 we will limit our claim to damages based upon orders of $100,000.00 per month since the evidence is undisputed that orders in that amount could have been handled by Sutherlin. That the mill could

have produced plywood to fill those orders is proved by Nordic's production in excess of that amount (See Exhibits 6, 133) at all times since September, 1954.

Exhibits 6 and 133 show the amount of production and sale value of the plywood produced after September, 1954. In September, Nordic's total sales were $54,249.78. In October, 1954, its sales were $146,638.58. In November, 1954, its sales were $136,580.39 and in December, 1954, it sales were $221,177.64. Its production and sales were maintained at that level or above for the remainder of the period until the time of trial on March 27, 1956, a period of more than 18 months and its average was well above $100,000.00 per month.

The average production and sales of the mill would have entitled us to much more than purchases of $100,000.00 per month, but to be conservative we will compute our damages only on the basis of orders totaling $100,000.00 per month. The record fully supports a recovery on this basis.

Appellant's gross profit was 5% (Tr. 95) and based on sales of $100,000.00 would have been $5,000.00 per month (Tr. 95). From the gross profit there should be deducted the cost of sales. The cost of sales would have been not more than $1,000.00 per month for sales of $100,000.00 (Tr. 95). Appellant's damages are $4000.00 per month (Tr. 95). For the 18 months from Sep-

tember 27, 1954 to the trial on March 27, 1956, appellant's damages are $72,000.00. For the period from April 21, 1954 to September 27, 1954, approximately five months, our damages were $20,000.00.

There are three views concerning the proper measure of damages against Nordic for interfering with and inducing a breach of contract; 30 Columbia L. Rev. 232. One view allows contract damages. Another permits a larger recovery which includes those damages that are proximately caused by the tort. A third goes even further and allows the recovery of damages as in the case of an intentional tort. No problem is presented here concerning which rule to apply because we claim only for the loss of our bargain or contract damages.

The record presents no question of fact concerning the amount of damages and we are claiming only the minimum amount. This court should direct the trial court to enter judgment against both Sutherlin and Nordic for $72,000.00 and against Sutherlin for an additional $20,000.00 damages up to the date of the trial on March 27, 1956.

This court should also direct the trial court to fix the damages incurred since the date of trial by appropriate proceedings.

IV

Sutherlin and Nordic should be enjoined from carrying out their wrongful purposes and required to grant appellant the right to purchase 80% of the output of the mill under the terms of the contract.

In the present case Sutherlin granted to appellant the right to purchase 80% of its output for 60 months. While the contract does not contain a negative clause that it will not sell or permit its production to be sold to others during the term of the contract, the law implies such a prohibition.

In *Lumley v. Wagner*, 1 De Gex M & G 604 Miss Wagner agreed to sing for plaintiff and not to sing elsewhere for three months. In enjoining Miss Wagner from singing elsewhere, the lord chancellor said:

> " 'The agreement to sing for the plaintiff, during three months, at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipu-

lation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she has actually entered.' "

In *Cort v. Lassard and Lucifer*, 18 Or 221, 22 Pac 1054 (1889) the rule of *Lumley v. Wagner* supra was adopted in Oregon. Lord J. said at p. 226 of the opinion that the principle is the same "even though the contract contains no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed."

In *Phez Co. v. Salem Fruit Union*, 103 Or 514, 201 Pac. 222, 205 Pac. 970, plaintiff contracted with the defendant cooperative to buy the entire crops of loganberries of certain member growers. The cooperative made separate contracts with the growers. The crop was not delivered and plaintiff sued both the cooperative and the growers seeking an injunction to prohibit both

the cooperative and the growers from selling their crop. The court held that a cause of action was stated against the defendant growers and expressed three theories of liability. Two were contractual, but the third sounded in tort. At p. 551 the court said:

> "If the defendants be regarded as strangers to the contract of sale between the fruit union and plaintiff, as contended by defendants, the complaint is still sufficient as to the defendant growers under the rule that where a stranger wrongfully induces another to commit a breach of contract, or intentionally disables such other from discharging the obligations of his contract, the wrongdoer is liable in damages, or in a proper case may be enjoined from carrying out his wrongful purposes . . ."

In the Phez case the court applied the doctrine of *Lumley v. Wagner*, supra and *Cort v. Lassard & Lucifer*, supra. At page 534 of the opinion the court said:

> "While it is practically impossible to compel specific performance of a contract of this nature, there is abundant authority that the court may by enjoining the contractor from selling his wares to anyone else, place him in a position where his own interests may be powerful enough to induce him to perform his contract."

At p. 535 the court said in speaking of the power to enjoin:

> "The present case is one where the invoking of this power might be peculiarly efficacious. The growing of loganberries is a new industry; their production is limited to a comparatively small area; they are perishable fruit incapable of shipment in a raw state to distant markets; and had the court below seen its way clear to enjoin the defendant growers from making delivery to any other party than this plaintiff, it seems almost inevitable that the contract would have been observed and the business which the complaint indicates the plaintiff had so assiduously and expensively labored to build up would have been saved from embarrassment and possible destruction."

It is clear that the law of Oregon authorizes an injunction preventing both the output promisor and the interferer from selling the output of the mill to anyone but the party rightfully entitled to it.

In the Phez case the court indicated that the defendant growers should have been enjoined "from making delivery to any other party than this plaintiff." So in the present case, Nordic which has wilfully interfered with our contract and prevented performance, should be enjoined "from making delivery to any other party than" appellant.

In the Phez case the individual growers, as strangers to the contract between the buyer and the cooperative had an output which in equity and good conscience belonged to the buyer. Here Nordic is similarly situated and has an output which in equity and good conscience belongs to appellant. An injunction should be issued preventing disposal of 80% of the mill's output to anyone but appellant under the terms of the contract.

CONCLUSION

Sutherlin made an agreement whereby it granted to appellant the right to purchase up to 80% of its output of plywood. Sutherlin agreed to accept and ship appellant's orders. Sutherlin agreed that the contract should continue in full force and effect from the beginning of production for at least 50 months.

As its part of the bargain appellant was required to and did (1) loan Sutherlin $80,000.00, (2) finance purchases of veneer for Sutherlin, (3) finance accounts receivable for Sutherlin and (4) supply Sutherlin with orders.

After the contract was made with Sutherlin, appellant ceased looking for other sources of plywood (Tr. 84).

The contract expressly states that it is to continue for at least 50 months. To carry out the purpose of the

contract, Sutherlin had to stay in operation for the term of the contract. But despite its obligation under the contract, Sutherlin operated only from January to April, 1954, when it ceased operation and failed to accept and ship appellant's orders as it had expressly promised to do.

When the plywood market improved in June, 1954, there was an unprecedented demand for plywood (Tr. 88) and, of course, for plywood mills. Sutherlin determined to make an advantageous sale and sold the mill for $660,000.00 to Nordic.

Both Sutherlin and Nordic knew that the sale of the mill would disable Sutherlin from further performance of its contract with appellant. But they went right ahead with the sale and disabled Sutherlin from performing its contract.

Now Sutherlin and Nordic contend that Sutherlin's financial difficulties excused it from performing its contract. This novel doctrine has no support in the authorities and its acceptance by the trial court is clearly erroneous.

But the financial problems of Sutherlin did not prevent its performance. Sutherlin had liabilities of only $213,270.10 on May 31, 1954 (Ex. 5, 131). Nordic started up the mill in September, 1954 with liabilities

of $679,319.19 (Ex. 6, 131) and had no trouble obtaining financing. Furthermore, Nordic had to obtain financing for green veneer purchases, the major expense, and to discount its accounts receivable at the bank. Veneer would have been purchased for Sutherlin by appellant and it would have needed no accounts receivable financing because appellant was obligated to make advances against production. The sum of the matter is that neither the facts nor the law support Sutherlin's claim that it was excused from continuing its operation for the term of the contract because of its financial difficulties.

Nordic's successful operation of the mill proves—if any proof is needed—that it was possible to operate the mill during the period when the demand for plywood and the price of plywood were at the highest point in the history of the industry. Nordic successfully operated the mill from September, 1954 until the time of trial on March 27, 1956.

Since April 21, 1954 neither Sutherlin nor Nordic have supplied appellant with any plywood. After Sutherlin breached its contract appellant was unable to procure plywood on a similar basis elsewhere (Tr. 87), and was damaged at least $4,000.00 per month (Tr. 93, 95) from April 21, 1954 to March 27, 1956, the date of the trial. Nordic is equally responsible for the damages from

September, 1954 to March 27, 1956 or in the sum of $72,000.00. Sutherlin is responsible for an additional sum of damages for the period between April 21, 1954 and September, 1954 or $20,000.00.

To prevent further destruction of appellant's contract rights and further litigation, Nordic should be enjoined from selling 80% of the output of the mill to anyone other than appellant pursuant to the terms of the contract.

This court should reverse the trial court's decision and hold as follows:

1. Financial difficulties are *not* an excuse for nonperformance of contractual duties.

2. The contract herein both expressly and by implication requires Sutherlin to continue in operation for the term of the contract lest by disposing of the plant or shutting it down, Sutherlin be permitted to destroy the subject matter of the contract, the output of the plant, in violation of the intention of the parties that sales under the contract would continue for the full term thereof.

3. Sutherlin breached its contract by failing to operate after April 21, 1954 and by disabling itself from performance by selling its mill to Nordic on September 7, 1954.

4. Nordic interfered with appellant's contract rights and induced a breach of its agreement with Sutherlin by purchasing the Sutherlin mill thereby disabling Sutherlin from the performance of its contract.

5. Judgment should be entered in favor of appellant and against Sutherlin and Nordic for the sum of $72,000.00, against Sutherlin for a further sum of $20,000.00 and the trial court should fix the amount of damages occurring since the trial on March 27, 1956.

6. Nordic should be enjoined from selling 80% of the output of its mill to anyone other than appellant pursuant to the terms of its contract.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
HERBERT H. ANDERSON,
CHARLES H. CLARKE,

800 Pacific Building,
Portland 4, Oregon

Attorneys for Appellant
Oregon Plywood Sales
Corporation